IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 226 OF 1993

Union of India ..Appellants

versus

Shri Murugan & Co. & Anr. ..Respondents

Mr. A. N. Samant for the Appellants.

Mr. R. V. Govilkar for the Respondents.

CORAM : D. G. DESHPANDE,J.

DATE : 20TH APRIL,2005

ORAL ORDER :

1. Heard learned counsel for the parties.

2. Counsel for the appellants raised only three points. Firstly, according to him issue No. 1 in this matter relates to competency of both the respondents to file claim petition. According to him only one of the respondents firm was registered and other one was not, but that would not affect the maintainability of the application. If the claim in respect of the goods handed over to the Railways for transportation, and if one of the firm is registered and regarding other firm the witness has power of attorney or application was signed on the basis of

power of attorney, therefore there is no illegality in the same, this objection has to be over ruled.

2. Secondly, though the RR was "said to contain" in that regard in group of appeal Nos. 14 of 1995 and others decided by me on 17.2.2005, in paragraph 10, I have discussed this aspect of the matter with reference to the judgment of the Division Bench which was relied upon by Mr. Samant. In the present case the consignment that was delivered was of 340 bags of cotton seed oil cakes booked under Railway Receipt No.620440 dated 9.7.1989 Ex. Tirruchirapalli to Wadibunder. When the consignment reached destination after abnormal delay, as many as 202 bags were found damaged by rain water. The claimants requested for Expert’s survey and it was found that 50% of the goods were in damage condition and loss was assessed at 80%. In this background the claim petition came to be filed before the RACT, Mumbai.

3. I had decided group of Appeals of the Union of India on 17.2.2005, one of the appeal being First Appeal No. 14 of 1995. In those appeals also Mr. Samant has raised defence that the goods were booked by the consignors to the Railway and the booking was done on the condition of "said to contain". Same defence is raised by Mr. Samant here also and

according to him it was for the respondents to prove as to how much goods were booked or entrusted to the appellants - Railways, and since that burden has not been discharged, the respondents were not entitled to any compensation from the railways.

4. I do find that this case also involves the same question. Firstly, it is a very specific case of the claimants that on 9.7.1989 the consignment which they gave to the Railways consisted of 340 bags of cotton seed oil cakes. They admittedly did not get all those 340 bags. Damage was assessed and as per joint survey report damage was to the extent of 80% of half of the 202 bags which comes to 80.8 bags. The damage is caused due to rains, therefore when the railways know as to how many bags were booked when they issued RR in that regard and when they assessed the damage and certified that the damage was to the extent of 80.8 bags then Railways cannot be permitted to raise the defence of "said to contain". In the aforesaid group of appeals, referred to by me and decided by me on 17.2.2005, this question was dealt by me in paragraphs 14, 15 and 16 as under :

> "14. It is clear that the stand of the railway in all these matters is that the goods were booked under "said-to-contain"

Head on the condition of said-to-contain and, therefore, ordinarily it can be held that it was for the applicant to prove how may goods were booked or entrusted to the railway viz. how may cement bags entrusted to the railway.

But in my opinion that alone will not solve the question, nor it will help the railway. The railway receipt, dated 2.11.1991, produced in Application OC 9300256, shows that The actual weight is given as 747/49 quintals; consignor was charged for Rs.19.99 per quintal and, amount of Rs.14,803/- was recovered. Question of number of cement bags would have been relevant, if the claim of the applicant would have been for 1492 bags, that is the loss or damage to all 1492 bags of cement sent under RR. However, the claim is only in respect of 71 bags out of 1492 bags and, those 71 bags were damaged due to rain water.

15. It is true that the plaintiff / applicants have not proved the actual number of bags entrusted to the railway. But their claim is for only 71 bags and if the RR is

taken into consideration and the weight of 747/49 quintal, then it has to be held that 71 bags minimum were entrusted to the railway. Otherwise charges would not have been to the extent of Rs.14803/-.

16. If the consignor makes a claim that he has entrusted 500 kg. of material on the basis of said-to-contain and, he states that he has received 300 kg. of material, then it will be of his responsibility to prove that he has entrusted 500 kg. of material. But when the claimant like applicant stated that under this RR 1492 bags were entrusted but he claims damages in respect of 71 bags only and when the railway receipt definitely proves that at least 71 bags were entrusted to the railway then railway cannot escape from the responsibility on the ground of failure of the applicant to prove as to how many bags were in the wagon. All the judgments referred to above, relied upon by Mr. Samant are of no help to him."

In view of the aforesaid facts, the defence raised by the appellants is required to be rejected and I reject the same.

5. Lastly, Mr. Samant contended that the Tribunal has awarded interest at the rate of 12% per annum from the date of application till realisation of the amount. Counsel for the appellants relied upon judgment of this court reported in **2005 (1) Mh.L.J. 165 Maharashtra State Electricity Board vs. Union of India**. It was a claim against the Railways and the interest was awarded ultimately by the High Court at 9% per annum. I had also followed same Judgment earlier. In view of this judgment, only thing that can be done, is modification of the impugned order. Therefore, I pass the following order :

ORDER

. Appeal is partly allowed.

. Respondents will be entitled to interest at the rate of 9% per annum on the amount decreed. No order as to costs of this Appeal.

. Amount that is found in excess after the aforesaid calculation shall be returned to the appellants. Respondents will be permitted to withdraw the amount as per the calculations, if not withdrawn.

20.04.2005 (D.G. DESHPANDE, J.)